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CONTENTS

Continued on next page

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ENVIRONMENTAL, ENERGY, & CLIMATE CHANGE™
LAW AND REGULATION REPORTER

FEATURE ARTICLE

ENVIRONMENTAL JUSTICE IN GENERAL PLANS: STRATEGIC CONSIDERATIONS FOR PLANNING AND LAND USE PROFESSIONALS

By Michele A. Staples, Esq.

The California Governor's Office of Planning and Research (OPR) updated its General Plan Environmental Justice Element Guidelines in June 2020 to address the Environmental Justice (EJ) requirements of Senate Bill 1000 of 2016, The Planning for Healthy Communities Act. (General Plan Guidelines Chapter 4: Environmental Justice Element (ca.gov).) The following is an overview of the EJ goals, requirements, procedures and tools, as well as insights into how they can inform diligence investigations for property acquisition and guide development project conceptualization.

The General Plan as the Planning and Land Use Framework

Every California city and county must have a General Plan, a long-term vision for their future growth and development. The California Supreme Court has characterized the General Plan as the "constitution" for a city's or county's growth and development. Like the state and federal constitutions, the General Plan sets the policy framework for the city or county which is then implemented through programs, ordinances and regulations. Virtually every land use decision in California is based on the city's or county's General Plan, including development project approvals. Development projects consistent with the General Plan can benefit from streamlined review while those inconsistent with the General Plan can be denied or their approvals overturned. In jurisdictions where the General Plan is found to be inadequate, courts have temporarily halted development project approvals until a legally valid General Plan is approved. As a result, the General Plan is the jurisdiction's critical community planning document as well as the starting point for planners and land use practitioners evaluating property acquisitions, conceptualizing development projects and crunching projects *pro forma*.

General Plans are required to include seven "Elements": Land Use, Housing, Transportation, Conservation, Open Space, Safety and Noise. (Gov. Code § 65302(a)-(g).) Each element has certain requirements that have evolved over time. Increased study and awareness of societal effects of unjust planning practices lead to Senate Bill (SB) 1000. SB 1000 requires cities and counties with identified disadvantaged communities in their jurisdictions to include an EJ Element or incorporate EJ policies in other General Plan elements. (Gov. Code, § 65302(h).) SB 1000 aims to correct the inequity to minority and low-income communities resulting from California's history of discriminatory land use policies by reducing the pollution experienced by these communities and ensuring their input is considered in planning decisions that affect them.

Environmental Justice and Disadvantaged Communities Defined

EJ is defined as:

> . . .the fair treatment and meaningful involvement of people of all races, cultures, incomes, and national origins with respect to the development, adoption, implementation, and enforcement of environmental laws, regulations, and policies. (Gov. Code, section 65040.12(e).)

Cities and counties with an identified "disadvantaged community" that revise two or more General Plan Elements concurrently are required to incorporate EJ into their General Plans. OPR strongly encourages jurisdictions without formally-defined disadvantaged communities to consider creating an optional EJ Element in order to promote equity and protect health and wellness in their communities.

Local jurisdictions have discretion to identify a disadvantaged community based on three identification methods in SB 1000. The first method of defining a disadvantaged community is based on the score calculated by the California Communities Environmental Health Screening Tool (CalEnviroScreen) developed by CalEPA's Office of Environmental Health Hazard Assessment as a mapping tool to identify environmentally burdened and vulnerable communities for investment opportunity under the state's Greenhouse Gas Reduction Fund Cap-and-Trade program. 25 percent of the proceeds from the fund must be spent on projects located in disadvantaged communities. Known as California Climate Investments, these funds are aimed at improving public health, quality of life and economic opportunity in identified disadvantaged communities while reducing greenhouse gas emissions.

The CalEnviroScreen model scores each of California's 8,000 census tracts based on 12 types of pollution burden such as pesticide use, drinking water contaminants and proximity to hazardous waste generators and facilities, and eight socioeconomic and health-related characteristics indicators related to pollution including low-income, asthma and cardiovascular disease. The census tracts that score the highest are the most burdened and most vulnerable to pollution. Under the first method for identifying disadvantaged community, an area is a disadvantaged community if it scores 75 percent or higher on CalEnviroScreen. (Gov. Code, § 65302, subd. (h)(4)(A).)

The other two definitions of disadvantaged community in SB 1000 are based on low-income areas having a disproportionate pollution burden or other hazards that can lead to negative health effects, exposure or environmental degradation. SB 1000 defines a "low-income area" as: 1) an area with household incomes at or below 80 percent of the statewide median income, or 2) an area with household incomes at or below the threshold designated as low income by the Department of Housing and Community Development's list of state income limits. If the local jurisdiction identifies low-income areas, it must then evaluate whether these areas are disproportionately affected by environmental pollution that can lead to negative health impacts, pollution exposures or environmental degradation. The CalEnviroScreen mapping tool displays its individual data layers that cities and counties can use as part of their examination of whether low-income areas may be disproportionately burdened by pollution. Tiffany Eng, the California Environmental Justice Alliance's Green Zones Program Manager, suggests that jurisdictions can identify disadvantaged communities within their boundaries by layering available data such as air quality data, local tribal areas, ethnicity, and other socio-economic demographic information to create a composite map.

OPR recommends that jurisdictions conduct early community engagement, particularly with low-income communities, communities of color, sensitive populations, tribal governments, and organizations focused on public health and EJ during the disadvantaged communities screening process. This can help to ensure that the location of disadvantaged communities is accurately identified and the nature of their environmental burdens, concerns and needs are specifically defined.

The OPR Guidelines encourage cities and counties to go beyond the SB 1000 statutory definition when identifying disadvantaged communities within their jurisdiction and also consider issues unique to areas within their jurisdiction which might not be reflected in the statewide data sets, such as a high pollution burden for one type of pollutant even when the overall CalEnviroScreen score is less than 75 percent, or the regional cost of living. For example, OPR suggests that, depending on the data and information available, local governments should consider whether there are disadvantaged communities in geographic units smaller than a census tract to ensure that all disadvantaged communities are recognized.

In addition to helping cities and counties define the presence, location and needs of disadvantaged communities within their jurisdiction for purposes of General Plan EJ policies, the CalEnviroScreen mapping tool provides a wealth of information that can help identify project opportunities and constraints such as identified pollutants, groundwater threats, noise and other environmental hazards in the project

site vicinity, as well EJ policies that discourage or promote certain types of development projects within areas identified as disadvantaged communities.

The Environmental Justice Process

Upon completion of the screening process, the city or county is required to include detailed information in the General Plan identifying and clearly defining the disadvantaged communities within the area covered by the General Plan, including their location and the nature of their environmental burdens, health risks and needs. The General Plan's EJ topics include information such as pollution exposure including air quality, water quality and land use compatibility; public facilities; accessibility to public transit, employment and services; health risks such as high fire threat and seismic risk areas; civic or community engagement; and prioritization of improvements.

Once the needs are clearly defined, local agencies are to develop draft goals, objectives, policies and programs to reduce health risks and associated issues with the aim to ensure fair treatment and meaningful involvement of people of all races, cultures, incomes and national origins. Government Code § 65302(h) requires the General Plan to identify specific EJ objectives and policies that do at least the following:

- Reduce exposure to pollution including improving air quality in disadvantaged communities. The OPR Guidelines suggest this could include land use and project siting, transportation improvements, tobacco smoke, pesticide drift and water quality, accessibility and affordability.

- Promote public facilities in disadvantaged communities. Examples include equitable access and connections to public services and community amenities.

- Promote food access in disadvantaged communities. Examples include streamlining project approvals for grocery stores in underserved areas, promoting community gardens and improving connectivity and transportation to provide access to grocery stores and farmer's markets.

- Promote safe and sanitary homes in disadvantaged communities. Examples include siting new housing near transportation and amenities, enforcing code requirements and providing and preserving affordable housing.

- Promote physical activity in disadvantaged communities. Examples include prioritizing park improvements in underserved areas; shared use agreements with schools, places of worship and other private properties; and planning connected bike and pedestrian routes and pathways.

- Reduce any unique or compounded health risks in disadvantaged communities not otherwise addressed above. The OPR Guidelines discuss is some depth the example of disadvantaged communities' heightened risk and increased sensitivity to climate change with less capacity and fewer resources to cope with, adapt to or recover from climate impacts.

- Promote civic engagement in the public decision-making process in disadvantaged communities. Examples given in the OPR Guidelines include partnering with community-based organizations, advocacy groups, and trusted leaders that work within the identified disadvantaged communities, and continuing to engage disadvantaged communities in General Plan implementation including review of new development projects, capital improvement plans, and other programs.

According to Ms. Eng, effective community outreach efforts have involved the participation of neighborhood schools, churches, housing justice organizations and environmental justice groups. One real measurement of EJ adequacy is whether community recommendations and feedback are incorporated into the final policies.

OPR's guidance on the EJ process puts a premium on community engagement in defining needs and developing and vetting policies. Likewise, the California Attorney General's comments on several cities' and counties' proposed EJ policies (posted at SB 1000 - Environmental Justice in Local Land Use Planning | State of California - Department of Justice - Office of the Attorney General) are particularly focused on robust community engagement to identify EJ needs within each city and county, and incorporating clear and actionable requirements responsive to communi-

ty comments in General Plans to accomplish EJ goals.

It is critical that the affected communities support the policies and programs intended to address their specific issues and needs. Those living in disadvantaged communities often have not participated in city and county decision-making processes, so staff and governing boards tasked with formulating objectives and policies to resolve environmental inequities might not have been made aware of specific community needs and the day-to-day barriers in the particular disadvantaged communities needing solutions. Ms. Eng points out that any investment in a disadvantaged community can lead to unintended consequences like rising housing prices and displacement. Proactive community engagement also provides opportunities for trust building, open communication and education between developers (who have knowledge and resources for housing and infrastructure) and residents (who have knowledge about the neighborhood that the developer may not otherwise have access to).

The City of Placentia Example

The City of Placentia's (City) Health, Wellness, & EJ Element is considered by OPR to be an example of a successful EJ process and garnered state and local awards for Opportunity and Empowerment from the American Planning Association California Chapter's Award of Merit and Orange County Section of the California Chapter of the American Planning Association's Award of Excellence. The City's EJ community outreach program included collaboration with a local nonprofit organization located in one of the disadvantaged communities, LOT #318, to engage with local residents in their neighborhoods through community meetings and surveys. The City provided outreach materials in Spanish and other appropriate languages, and provided a translator or translation headsets at public meetings to enable residents to engage firsthand with the meeting content. Because of the City's effective community outreach efforts, its EJ Element was able to detail residents' concerns and specifically address those concerns through the goals and policies.

Joe Lambert, director of development services for the City, purposely structured community meetings as talking with neighbors. The City learned through those discussions about physical barriers to health and wellness such as inadequate sidewalks and street lights making residents feel unsafe walking their children to school alongside traffic or walking 20 minutes from the nearest parking space to their apartment after dark. A lack of public transportation prevented residents from accessing healthy food choices located too far away at the farmers market and grocery stores. Renters put up with subpar living conditions because they were afraid of the potential ramifications if they asked the landlord to make repairs. Obtaining such specific community input enabled Placentia to develop EJ policies that directly address the concerns raised by the community relating to improved pedestrian lighting and code enforcement, increased access to green spaces to encourage physical activity, and expanded hours and locations for food distribution programs.

Involve and Engage Disadvantaged Communities in General Plan Implementation

OPR suggests that local jurisdictions should continue to involve and engage disadvantaged communities in General Plan implementation activities on an ongoing basis after adoption of the General Plan update. For example, civic engagement should be included in reviewing proposed development projects and associated entitlements, proposals for amending zoning or other implementing codes or standards, local neighborhood-level Specific Plan or revitalization efforts, and capital improvement plans or facility master planning. Public outreach should address barriers to participation such as language and transportation to foster transparency and enable community input to influence the planning process. The OPR Guidelines further suggest that all cities and counties, not just those with disadvantaged communities, implement such a holistic planning approach in their General Plan or other local planning documents to promote equity and protect human health from environmental hazards.

For development projects within identified disadvantaged communities, the city's or county's EJ outreach program may provide a template for how public review and comment on project entitlements will be handled.

Examples of Environmental Justice Policies

OPR has developed Model EJ Policies for General Plans to accompany the OPR Guidelines (Model

EJ Policies for General Plans (ca.gov)). The OPR Guidelines also provide links to EJ Elements and policies in city and county General Plans as examples.

Many EJ policies are familiar land use and planning topics, such as promoting transit-oriented development and encouraging water- and energy-conserving features in new development projects. Some EJ policies such as the following city General Plan policies are tailored specifically to community barriers to health, wellness and engagement in order to address the unique and compounded health risks to EJ communities as required by SB 1000:

•Consider environmental justice issues as they are related to potential health impacts associated with land use decisions, including enforcement actions, to reduce the adverse health effects of hazardous materials, industrial activities, and other undesirable land uses, on residents regardless of age, culture, ethnicity, gender, race, socioeconomic status, or geographic location (National City HEJ-1.2)

•Consider any potential air quality impacts when making land use or mobility decisions for new development, even if not required by California Environmental Quality Act (Placentia HW/EJ 10.9)

•Conduct City Council visits to disadvantaged neighborhoods to encourage discussion on items that affect the residents and businesses. Have Council accompanied by representatives from Police, Code Enforcement, Development and Community Services, and other departments. Host an annual community walk with the Mayor and other Council members (Placentia HW/EJ 15.6)

•Promote capacity-building efforts to educate and involve traditionally underrepresented populations in the public decision-making process (Inglewood EJ-1.9)

•Encourage the development of healthy food establishments in areas with a high concentration of fast -food establishments, convenience stores, and liquor stores. For example, through updated Zoning regulations, tailor use requirements to encourage quality, sit down restaurants, in areas that lack them (Inglewood EJ-4.2)

•Prioritize projects that significantly address social and economic needs of the economically vulnerable populations. Address and reverse the underlying socioeconomic factors and residential social segregation in the community that contributes to crime and violence in the city (Richmond HL-33)

•Ensure that contaminated sites in the city are adequately remediated before allowing new development. Engage the community in overseeing remediation of toxic sites and the permitting and monitoring of potentially hazardous industrial uses. Develop a response plan to address existing contaminated sites in the city. Coordinate with regional, state, and federal agencies. Include guidelines for convening an oversight committee with community representation to advise and oversee toxic site cleanup and remediation on specific sites in the city. Address uses such as residential units, urban agriculture, and other sensitive uses (Richmond HL-40).

The information in an EJ Element can inform private planning and land use decisions, such as whether the local jurisdiction considers certain locations appropriate for new residential, commercial or industrial projects and whether there may be additional procedural steps in the entitlement review process. For development projects located within an area identified as a disadvantaged community, the EJ policies help identify on- and off-site infrastructure, amenities and services that may be required in connection with project development, and provide a ready source of information to help analyze the compatibility of a proposed project, the potential extent of California Environmental Quality Act review and mitigation measures, and community organizations that should be consulted in the project conceptualization process.

Environmental Justice Resources

Helpful EJ resources appear below:

•The Attorney General's SB 1000 webpage (SB 1000 - Environmental Justice in Local Land Use Planning | State of California - Department of Justice - Office of the Attorney General) includes helpful links to EJ resources including the Attorney General's EJ-related comments on several city and county draft General Plans, example EJ Ele-

ments and policies, a link to CalEnviroScreen and links to each of the 12 pollution indicator maps, CalEPA's Disadvantaged Communities Mapping Tool, and several other regional, state and federal environmental mapping tools.

- The OPR Guidelines (https://opr.ca.gov/docs/20200706-GPG_Chapter_4_EJ.pdf) include a list of several scientific based tools developed by other agencies and academia that provide information relevant to EJ considerations, as well as links to EJ Elements and policies in General Plans adopted by several jurisdictions throughout the state. The following OPR email address is dedicated to SB 1000 questions: SB1000@OPR.CA.GOV.

- Background information detailing the root causes of California's environmental inequities is included in the OPR Guidelines and in the 2017 book, *The Color of Law: A forgotten History of How Our Government Segregated America*, by Richard Rothstein.

- The California Environmental Justice Alliance (one of the SB 1000 co-sponsors) prepared the "CEJA SB 1000 Implementation Toolkit" to provide guidance on implementing SB 1000's mandates: https://www.caleja.org/sb1000-toolkit

Conclusion and Implications

Environmental Justice-related tools will help guide more equitable planning policies while providing valuable resources to inform property acquisition and development project conceptualization. Perhaps EJ's greatest value will be the beneficial results of fostering communication with residents who have not been involved in the decision-making processes affecting them and the societal and economic benefits resulting from reversing the negative effects of pollution and environmental degradation that have burdened the most vulnerable for too long.

Michele A. Staples, Esq., is a shareholder at Jackson Tidus, A Law Corporation. Michele has over 30 years' experience representing a broad spectrum of clients from publicly traded companies to individuals in land use, project entitlement, water resources and environmental matters. Michele's experience includes conducting diligence investigations on behalf of developers for acquisition of property and projects, securing land use entitlements for commercial, residential and mixed-use projects, obtaining permits and approvals to revamp development projects to respond to changing market conditions, and resolving high-profile disputes involving development and use of land, natural resources and water resources. Ms. Staples is a long-serving member of the Advisory Board of the *California Water Law & Policy Reporter* and a frequent contributor to the *California Land Use Law & Policy Reporter*.

ENVIRONMENTAL NEWS

ARIZONA AND NEVADA TAKE MAJOR STEPS TOWARDS GREENHOUSE GAS REDUCTIONS BY 2050

Recently, both Arizona and Nevada took major strides to achieve a net-zero carbon emissions future by 2050. Meanwhile, Nevada released a climate strategy looking to zero emissions by 2050.

Background

The Arizona Corporation Commission (ACC), a quasi-executive regulatory agency of the state regulating non-municipal utility companies, including energy companies, initiated the final rulemaking process requiring utilities in the state to be 100 percent free of carbon emissions by 2050. If the proposed energy rules are finalized, Arizona will become the seventh state to pass measures that lead to 100 percent renewable or carbon-free electricity in the future. While in Nevada, the state's Climate Initiative (NCI) released a State Climate Strategy that provides proposals for bold actions to reduce carbon emissions in the electric, transportation, and building sectors, and to reach zero emissions by 2050 economy-wide. With these ambitious policy efforts, both states have demonstrated remarkable leadership towards a carbon-free future; however, the challenge is how to attain these goals.

Arizona To Achieve 100 Percent Carbon-Free Energy by 2050

Arizona took a major step towards culmination of a long rulemaking process to replace its 2006 Renewable Energy Standard and Tariff [https://azcc.gov/utilities/electric/renewable-energy-standard-and-tariff] and amend the state's energy rules. In a special meeting on November 13, 2020, the ACC, by a 4-1 vote of the commissioners, approved moving forward with publication of a Notice of Proposed Rulemaking for new energy rules that would require the Arizona's investor-owned utilities to comply with a 100 percent reduction in its carbon emissions by January 1, 2050. (Ariz. Corp. Commission, Decision No. 77829 [https://docket.images.azcc.gov/0000202570.pdf?i=1608503006120] docketed Nov. 23, 2020.)

This rulemaking proposes to repeal the current energy rules for: 1) resource planning and procurement for regulated load-serving entities, 2) renewable energy requirements for regulated electric utilities, and 3) energy efficiency standards for regulated electric and gas utilities. In terms of carbon emissions reduction, the proposed rules also include interim targets of 50 percent carbon emissions reductions by 2032, and 75 percent by 2040. According to the proposed rules, carbon-free electric resources to meet these mandates may include nuclear power generation and renewable resources such as solar, wind, biogas, biopower, hydroelectric, and geothermal electric generators.

The proposed rules establish mandatory standards for ACC-regulated utilities to follow in generating, procuring, and delivering electric or gas services. In particular, the new rules require that each ACC-regulated electric utility file a Clean Energy Implementation Plan (Plan) by April l every third year, beginning April l, 2023. The Plan shall include measures to be taken by each ACC-regulated electric utility to achieve the following goals: 1) meeting the 2032, 2040 and 2050 carbon emissions reduction goals; 2) providing a demand-side management program, including traditional energy efficiency, demand response and other programs that focus on reducing overall energy usage, peak demand management and load shifting by at least 35 percent of 2020 peak demand by January l, 2030, "with an average of at least 1.3 percent annual energy efficiency savings starting in 2021"; and 3) providing at least 5 percent of the ACC-regulated electric utility's peak 2020 demand, "of which at least 40 [percent] shall be derived from Customer-owned or Customer-leased Distributed Storage" by December 31, 2035. In addition, the proposed rules establish minimum information requirements for such Clean Energy Implementation Plans.

The proposed rules also require a Clean Energy

Implementation Plan for:

> . . .each Class A Gas utility to consider and propose energy efficiency measures and programs, and . . . each Load-Serving Entity to follow a resource planning process, including, for all new resource procurements, an all-source request for information (ASRFI) process, and an all-source request for proposals (ASRFP) process.

The new rules would require the ASRFP process to be overseen by an Independent Monitor, and provide exceptions from the ASRFI and ASRFP.

A few steps remain before the rules are officially implemented. The Notice of Proposed Rulemaking for the proposed energy rules was published on December 1, 2020, commencing the formal public comment period and the public can submit written comments on the proposed energy rules to ACC by January 22, 2021. Oral comments may be provided during ACC's Hearing Division's telephonic oral proceedings to be held on January 19 and 20, 2021. The energy rules are likely to be finalized in March 2021. More information for the proposed rules and the rule making docket for the proposed rules can be accessed here: Docket No. RU-00000A-l8-0284, available at: https://edocket.azcc.gov/search/docket-search/item-detail/21658

Nevada Releases Plan for a Carbon-Free Economy by 2050

In June 2019, Governor Sisolak signed Senate Bill (SB) 254 that set aggressive, economy-wide greenhouse gas (GHG) emissions-reduction targets for the state: 28 percent by 2025, 45 percent by 2030, and net-zero by 2050 in comparison to the 2005 GHG emissions baseline. (Nev. Rev. Stat. § 445B.380(2)(c) (2019).) As a foundation to implement SB 254, the Governor issued an Executive Order on Climate Change [https://gov.nv.gov/News/Executive_Orders/2019/Executive_Order_2019-22_Directing_Executive_Branch_to_Advance_Nevada_s_Climate_Goals/] in November 2019, directing state agencies and departments to evaluate, identify and recommend the most effective climate policies and regulatory initiatives in a comprehensive State Climate Strategy to be delivered to the Governor by December 1, 2020. In order to come up with the Strategy, the Governor launched the NCI in summer of 2020 to provide a framework for Nevada-wide climate action.

The NCI released the 2020 State Climate Strategy (Strategy) on December 1, 2020. *See:* https://climateaction.nv.gov/our-strategy/. It provides "new mitigation-focused policies, programs, investments, and regulations" that are required to achieve the ambitious 2050 goal of net-zero GHG emissions for the state's economy from all the major economic sectors, including electricity generation and transportation sectors, the major GHG contributor sectors in the state. In addition, the Strategy also provides a ground work for climate adaptation and resilience. The Strategy was developed using the best available science, and includes robust public input from nine virtual listening sessions on a range of climate topics and 1,500 survey responses. The Strategy is designed to be a living document and will be updated periodically as the impacts of climate change evolve and new climate-friendly technologies become available.

Seventeen Policy Recommendations

The Strategy provides 17 specific policy recommendations to implement SB 254 goals, including the elimination of gas-powered heating and cooking in homes and businesses, buyback programs for high-polluting vehicles, expansion of urban forestry programs, and adoption of energy codes for buildings with net-zero energy consumption and energy-efficient labeling for homes, a program similar to how the appliances are graded. In the transportation sector, the Strategy provides policy recommendations such as adopting lower and zero-emissions vehicle standards, implementing a clean truck program, adopting low-carbon fuel standards, implementing the "cash for clunkers" rebate system, and closing emissions inspection loopholes for classic cars. For the energy sector, the Strategy provides policies to realize SB 358's goal of producing energy from zero- emissions resources by 2050. The Strategy includes policy recommendations for "moving to alternative sources including policy mechanisms such as a clean energy standards, securitization (allowing customer-backed bonds to pay off stranded asset costs), and alternative rate-making mechanisms" by the Nevada Public Utilities Commission (PUCN).

The Strategy proposes that each regulated electric utility prepare a GHG reduction plan, and prioritize decarbonization in its integrated resource plans (IRPs) that must be filed with PUCN on or before

June 1, every three years. Currently, natural gas-fired generating units can be used as placeholders in the IRP in the electric utility's supply-side plan. The Strategy proposes to eliminate the use of natural gas units as placeholders in the IRPs, and require the electric utility to use placeholders that are more consistent with the state's GHG emissions-reduction goals. The Strategy proposed "requiring utilities to integrate more-comprehensive equity considerations in the IRP in order to address social justice issues . . . ."

Overall, the Strategy analyzes and recommends several policies, but it does not dictate policy to the state legislature, local governments and state regulators. However, the Strategy clarifies that the state's business-as-usual is not working. Based on the 2019 GHG inventory of the state, Nevada will be 4 percent short of the 2025 emissions-reduction goal and 19 percent short of the 2030 emissions-reduction goal of SB 254, if no further state action was taken. The Strategy finds that the state's failure to hit these SB 254 targets could be costly:

> . . .as the reduction targets would prevent up to $786 million in economic damages by 2030 and up to $4 billion by 2050, according to the report, specifically from damages from extreme weather events such as hurricanes or wildfire.

For more information, see: https://climateaction.nv.gov/our-strategy/.

Conclusion and Implications

Both the recent Arizona and Nevada policy initiatives represent a major step towards the carbon-free future for the two states in 2050. If the proposed energy rules in Arizona are finalized and the policy recommendations of the Strategy are adopted and implemented in Nevada, electric utilities will have the affirmative responsibility to procure carbon-free electricity, and invest in alternative energy and energy storage technologies. While both the states have proposed noble goals through these efforts, it remains to be seen how the economic conditions and technologies keep up in terms of implementing and meeting these aggressive 2050 goals.
(Hina Gupta)

LEGISLATIVE DEVELOPMENTS

FEDERAL LEGISLATION REINTRODUCED TO TACKLE PFAS WATER CONTAMINATION ISSUES

A growing concern over the effects of water contaminants perfluoroalkyl and polyfluoroalkyl substances (commonly referred to as PFAS) in recent years has resulted in several states passing legislation to impose regulations on these "forever chemicals." Congress also made attempts at federal regulation. With a new federal administration on the horizon, Congressional proponents of such regulation are preparing to reintroduce previously stalled PFAS legislation.

Background

PFAS can be found in many household products that have been used for decades. It has also been increasingly discovered in drinking water throughout California and the United States. For example, firefighting foam widely employed on military bases, airports and at industrial sites has been found to be one prevalent source of PFAS in groundwater basins supplying drinking water.

Scientists refer to PFAS as "forever chemicals" because they accumulate in the human body and do not dissipate over time. Human exposure to PFAS chemicals has been linked to kidney and testicular cancer, high levels of cholesterol, thyroid disease and other health issues.

PFAS Legislation Reintroduced in 2020

Early in 2020, the United States House of Representatives passed House Resolution (HR) 535; however, the bill did not go on to pass in the Senate. Recent reports indicate that the House intends to reintroduce PFAS legislation in early 2021, to signal to the incoming Biden administration the importance of regulating PFAS. This bill, unless further modified, would propose to enact a variety of PFAS related controls, including the following:

- The Environmental Protection Agency (EPA) would be required to designate certain PFAS as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (Superfund). The EPA would then have five years to determine whether the remaining PFAS should be designated as hazardous substances, individually or in groups. However, the bill would exempt public agencies or private owners of public airports that receive federal funding from Superfund liability for remediation of certain releases of PFAS into the environment resulting from the use of aqueous film forming foam in certain circumstances.

- The EPA would be required to create regulations for the disposal of materials containing PFAS or aqueous film forming foam. Within one year, the EPA would be required to issue guidance on minimizing the use of, or contact with, firefighting foam and other related equipment containing any PFAS by fire fighters and other first responders, without jeopardizing firefighting efforts. Additionally, materials containing PFAS would be considered hazardous waste for criminal penalty purposes.

- The bill would also require the EPA to promulgate a national primary drinking water regulation for certain PFAS within two years, and would require it to consider regulating additional PFAS or classes of PFAS in drinking water within a set time frame. The EPA would publish a health advisory for PFAS not subject to a national primary drinking water regulation.

- The EPA would be prohibited from imposing financial penalties for a violation of a PFAS national primary drinking water regulation within the first five years after the bill's enactment into law.

- The bill would require the EPA to establish a grant program to financially assist community water systems with treating PFAS contaminated water.

- The EPA would be directed to investigate methods and means to prevent contamination of surface waters, including those used for drinking water, by certain PFAS.

- An owner or operator of an industrial source would be prohibited from introducing PFAS into treatment works (systems that treat municipal sewage or industrial wastes) unless such owner or operator first provides certain notices to such treatment works, including notice of the identity and quantity of the introduced PFAS.

- The EPA would biennially review the discharge of PFAS from certain point sources and make a determination whether or not to add certain measureable PFAS to the list of toxic pollutants, or to establish effluent limitations and pretreatment standards for such PFAS.

The Biden Administration's Stance on PFAS

Even if the reintroduction of HR 535 again fails in the Senate, the Biden administration would likely consider pursuing actions via the executive action to limit PFAS exposure. Such actions could include Superfund designation of PFAS as hazardous substances. The Biden administration's online environmental justice platform (https://joebiden.com/environmental-justice-plan/) has already signaled that it intends to prioritize PFAS regulation by:

> . . .designating PFAS as a hazardous substance, setting enforceable limits for PFAS in the Safe Drinking Water Act, prioritizing substitutes through procurement, and accelerating toxicity studies and research on PFAS.

Conclusion and Implications

HR 535 is intended to create a safer working environment for those exposed to PFAS while also reducing the exposure of PFAS in drinking water supplies. However, whether this bill becomes law depends largely on the balance of power in Congress, which as of the data of this writing remains undetermined. Nevertheless, this bill is intended to signal the importance of PFAS regulation in order to encourage action from the executive branch with respect to setting new PFAS controls during the next presidential administration. For more information on HR 535 *see*: https://www.congress.gov/bill/116th-congress/house-bill/535

(Gabriel J. Pitassi, Derek R. Hoffman)

CLIMATE CHANGE SCIENCE

RECENT SCIENTIFIC STUDIES ON CLIMATE CHANGE

Potential Recovery Pathway for Coral

Coral reefs are in danger of becoming extinct under the worst climate change scenarios. Climate change increases thermal stressors on coral reef systems, disrupting the photosynthetic algae that live symbiotically with coral. When the algae die, the coral loses its color in a process known as "bleaching." Widespread coral bleaching would be detrimental to coral ecosystems, so a lot of research is being done to try to identify pathways for coral survival in the face of climate change.

A team of biologists, marine scientists, and atmospheric scientists tracked coral bleaching during a prolonged heat wave in the equatorial Pacific Ocean from 2015 to 2016. At the start of the natural experiment, the scientists identified a number of coral colonies that represented a variety of chronic human disturbance levels. Notably, these coral colonies also had multiple species of symbiotic algae growing on them. After two months, there were significant differences in coral bleaching among the colonies: coral that were dominated by heat-tolerant algae were less bleached than those dominated by heat-sensitive algae, despite the heat wave continuing. This indicates a previously unobserved pathway for coral survival, showing that coral can resist bleaching during prolonged heat waves by associating with heat-tolerant algae. Because this phenomenon had not yet been observed, the team of scientists conducted a series of robust verification experiments in a laboratory setting. These experiments confirmed conclusively that this pathway could protect coral systems from prolonged heat waves. However, this is not a silver bullet solution for coral resilience and recovery; the coral colonies that had the most heat-tolerant algae were also the colonies that had the lowest levels of chronic human disturbance. Thus, the survival of coral colonies may rely on elimination of other anthropogenic stressors that are causing the heat-sensitive algae to associate with coral colonies.

Prolonged heat waves are anticipated to increase in duration and frequency over the next century as a result of the changing climate. Therefore, it is critical to identify pathways like this to promote resilience in important keystone ecosystem species such as coral that are sensitive to heat waves. However, even if scientists are able to identify such pathways, no survival pathway is more reliable than the large-scale mitigation of greenhouse gas emissions.

See: Claar, D., *et al*. Dynamic symbioses reveal pathways to coral survival through prolonged heatwaves. Nature Communications, 2020; DOI:10.1038/s41467-020-19169-y

Costs of Implementing Forest-Based GHG Mitigation Strategies in Order to Limit Warming

The Intergovernmental Panel on Climate Change (IPCC) recommends a wide range of climate change mitigation strategies in order to prevent global warming above 2°C. These strategies range from the mass implementation of carbon capture infrastructure to the decarbonization of the energy sector. Forests naturally play an important role in the carbon cycle, but deforestation and other land use changes have caused large quantities of carbon to be released back into the atmosphere, rather than be held within natural carbon sinks. The revitalization of forests and their natural carbon sequestration abilities can contribute significantly to climate change mitigation efforts.

A recent study published in Nature Communications by Austin et.al. evaluates the economic costs associated with various forest-centered mitigation strategies. Using the Global Timber Model (GTM), the researchers estimated future greenhouse gas (GHG) fluxes from forest management without mitigation incentives and with mitigation incentives (rental payments for carbon sequestration) at various price points ($5 to $100 per ton of CO_2). The mitigation activities considered include avoided deforestation, forest management activities, increasing harvest rotations, and afforestation/reforestation. Depending on the price scenario, forest GHG strategies could result in the mitigation of between 12.1 and 102.9

gigatons CO_2 ($GtCO_2$) by 2035, which is an average of 0.6 to 5.2 $GtCO_2$ per year at an annual cost of $1 to $178 billion per year. The total mitigation could increase to between 25.2 and 329 $GtCO_2$ by 2055, which is an average of 0.6 to 6.0 $GtCO_2$ per year at an annual cost of $2 to$393 billion per year. The high ends of these ranges (5.2 $GtCO_2$/yr in 2035 and 6.0 $GtCO_2$/yr in 2055) correspond to 15 percent and 10 percent of the 2030 and mid-century GHG mitigation requirements, respectively, to limit warming to 1.5°C. Although these results indicate that it is possible for forest-centric mitigation strategies to make a significant difference when it comes to fighting global warming, the study also acknowledged that there are diminishing returns associated with GHG mitigation incentives. For example, a 90 percent drop in total cost is observed if the aforementioned GHG targets are reduced by 60 percent. Of the four mitigation activities considered, reforestation has the highest mitigation potential, ranging from 0.1 to 2.6 $GtCO_2$ per year, with the ranges for avoided deforestation, forest management, and new harvest rotations falling within these bounds.

Mitigation potential also varies by forest type. The study found that the vast majority (72 to 82 percent) of mitigation would occur in tropical forests, with Brazil, the Democratic Republic of Congo, and Indonesia playing the largest roles. Avoided deforestation and reforestation would be the primary mitigation strategies in these locations. As time goes on, however, forest management and harvest rotation strategies in temperate and boreal regions will play a much more significant role. By 2055, 18-28 percent of mitigation would occur in temperature and boreal forests, with approximately 24-30 percent of this mitigation attributed to the US.

See: Austin, K.G., Baker, J.S., Sohngen, B.L. *et al.* The economic costs of planting, preserving, and managing the world's forests to mitigate climate change. *Nat Commun* **11,** 5946 (2020). https://doi.org/10.1038/s41467-020-19578-z

The Relationship between Nitrogen and Carbon Dioxide in GHG Emissions from Soil Respiration

Soil is one of the largest terrestrial carbon sinks, storing a substantial amount of carbon dioxide from organic matter. Soil also releases carbon dioxide to the atmosphere through microbial respiration that occurs with the decomposition of organic material in the soil. Several parameters including atmospheric CO_2 and the concentration of nitrogen in soil are known to interact with the CO_2 stored in the soil. However, these two parameters have largely been studied independently, and their impact on the magnitude of CO_2 release is largely unknown. As atmospheric carbon increases and soil nitrogen availability decreases, the magnitude of CO_2 emitted from soil may have strong implications for GHG emissions projections in climate models.

An international research team based at the University of Oklahoma studied how the relationship between atmospheric carbon dioxide and nitrogen in the soil impacts the release of CO_2 from the soil, in turn affecting atmospheric carbon dioxide levels. The researchers used data from an experiment of Minnesota grassland that ran for 12 years from 1997-2009. The findings show that a low nitrogen supply in the soil led to a gradually stronger positive response of atmospheric CO_2 inducing soil respiration, thus increasing the release of CO_2 from the soil to the atmosphere. Given the global increase of atmospheric CO_2, the results indicate that a low soil nitrogen supply accelerates the release of CO_2 from soil respiration. While the data were specific to Minnesota grasslands, the researchers point to the possibility that the results may generalize to other soil ecosystems with low nitrogen, yielding a widely positive feedback of atmospheric CO_2 on the release of soil CO_2.

Nitrogen is abundant in the atmosphere, though limited in natural soil environments. The results of the study thus indicate a large potential for a global increase in atmospheric CO_2 from soil release, which would have considerable impact on climate projections.

See: Qun Gao, Gangsheng Wang, Kai Xue, Yunfeng Yang, Jianping Xie, Hao Yu, Shijie Bai, Feifei Liu, Zhili He, Daliang Ning, Sarah E. Hobbie, Peter B. Reich, and Jizhong Zhou. **Stimulation of soil respiration by elevated CO2 is enhanced under nitrogen limitation in a decade-long grassland study.** *PNAS*, 2020 DOI: 10.1073/pnas.2002780117

Environmental Impacts on Peatland Carbon Fluxes

Peatlands are terrestrial wetland ecosystems that store and sequester carbon by preventing the full decomposition of organic plant matter, resulting in

the accumulation of peat (International Peatland Society). As a sink, peatlands are considered stable, conducting a net carbon exchange with the atmosphere equivalent to ~1 percent of human fossil fuel emissions and storing 25 percent of global soil carbon stock. However, peatlands are expected to shift from acting as a carbon sink to a carbon source within the next century, a result of changes to permafrost dynamics in the high latitudes and land use changes in the boreal, temperate, and tropical regions. Currently, peatlands are not included in the modelling frameworks for Earth System Models (ESMs) and Integrated Assessment Models (IAMs). Given the uncertainty surrounding projected environmental impacts on the ability of peatlands to store or emit carbon, this exclusion leads to incomplete future climate change projections and their related studies in impact and mitigation.

To analyze this uncertainty, a study prepared for Nature Climate Change by Loisel *et al.* used expert testimony from 44 peat experts, corroborated with a literature review, to study the impacts of changes in environmental conditions on the peatlands ability to uptake or emit global carbon. Loisel *et al.* elicited expert testimony on changes in temperature, moisture, sea level, fire, land use, permafrost, nitrogen deposition, and atmospheric pollution for the extratropical northern region and the sub-tropical region during the post-Last Glacial Maximum, Anthropocene, near future, and far future eras. The confidence and expertise levels of the experts were also considered for each response in this semi-quantitative study.

The study found that different conditions were considered the main drivers in carbon stock for each era. Temperature and moisture, which are largely considered impossible to analyze separately, were the most important long-term drivers for the post-Last Glacial Maximum. During the Anthropocene, land use changes were the main source of anthropogenic pressure on peatlands, with fires and permafrost dynamics contributing to carbon losses. Future scenarios, both near-future and far future, are expected to amplify these carbon loss mechanisms, shifting peatlands from a global carbon sink to a carbon source.

The study also identified key knowledge gaps and uncertainties, particularly in the impact of permafrost dynamics on the peatland carbon balance. Two opposing schools of thought were summarized: 1) permafrost thaw will lead to rapid carbon loss from deep peats with slow recovery of the peatlands and 2) the warm and moist conditions that permit permafrost thaw will encourage rapidly recovering plant production, causing net carbon gain.

Loisel *et al.* suggest that these findings encourage the inclusion of peatland process understanding in models. Incorporating peatlands and organic soils in ESMs will allow for further study of the cross-scale interactions of temperature and moisture, while IAMs that consider peatlands can help reduce the uncertainty of land use change simulations and impact subsequent policy decisions. The benefits are therefore twofold: incorporating peatlands in carbon modelling efforts can improve carbon flux predictions while also benefiting peatland research in what Loisel *et al.* describe as a positive feedback loop.

See: Loisel, J., Gallego-Sala, A.V., Amesbury, M.J. *et al.* Expert assessment of future vulnerability of the global peatland carbon sink. Nat. Clim. Chang. (2020). https://doi.org/10.1038/s41558-020-00944-0

Also referenced: "What Are Peatlands"? International Peatland Society, 22 Sept. 2020, www.peatlands.org/peatlands/what-are-peatlands/

(Abby Kirchofer, Libby Koolik, Shaena Berlin Ulissi, Ashley Krueder)

REGULATORY DEVELOPMENTS

CALIFORNIA AIR RESOURCES BOARD EXPANDS CRITERIA FOR AIR POLLUTANT AND TOXIC AIR CONTAMINANT REPORTING WITH AMENDMENT OF REGULATIONS

On November 19, 2020, the California Air Resources Board (CARB) approved amendments to the Regulation for the Reporting of Criteria Air Pollutants and Toxic Air Contaminants (the Regulation) (17 Cal. Code Regs. § 93400 *et seq.*) to expand emissions reporting requirements for facilities with air permits in California, consistent with parallel amendments to CARB's Air Toxics "Hot Spots" Emission Inventory Criteria and Guidelines Regulation (Hot Spots Regulation) (17 Cal. Code Regs. § 93300 *et seq.*). The Regulation was originally adopted in 2018 and became effective on January 1, 2020, requiring annual reporting of criteria air pollutant and toxic air contaminant emissions from approximately 1,300 facilities in California. With the amendment of the Regulation, CARB is seeking a more comprehensive assessment of emissions from permitted facilities statewide and to unify several existing reporting structures.

Key Changes to the Regulation

Expansion of the Regulation

The number of facilities in the state subject to reporting requirements will expand substantially with the amendments to the Regulation, from about 1,300 facilities to approximately 60,000 facilities at full implementation of the amendments. Under the Regulation as originally adopted, three types of facilities were required to report their emissions: 1) facilities required to report its greenhouse gas (GHG) emissions under the state's mandatory GHG reporting regulation, excluding electric power entities and fuel and carbon dioxide suppliers, 2) any facility with a permit to emit 250 or more tons per year of any criteria air pollutant, if the air district in which the facility is located is in nonattainment under federal or state standards for that air pollutant, and 3) facilities that are categorized by the local air district as high priority under the Air Toxics "Hot Spots" Information and Assessment Act. The amendments provide additional applicability criteria, tied to the permitted emissions processes present at a facility and pollutants emitted at the facility. The amended Regulation provides three additional thresholds triggering reporting at a given facility: 1) emissions of four or more tons per year of any criteria air pollutant, except carbon monoxide (CO), 2) emissions of 100 or more tons per year of CO, or 3) activities or emissions above the levels set for the facility's permitted emissions process. The amendments also include about 200 additional chemicals subject to initial quantification and reporting, consistent with concurrent amendments to the Hot Spots Regulation.

Phase-In for New Reporting Facilities

The timing of a facility's initial emissions reporting obligation under the amended Regulation corresponds to the "Phase" and "District Group" it is assigned under the amendments. Facilities potentially subject to reporting under the amended Regulation are grouped into 52 sectors according to the permitted processes present at the facility, with the sectors divided into three Phases. Each sector has a different reporting threshold based on an activity level. Certain sectors are required to report under the Regulation if the facility's process has "any activity level." The reporting threshold for other sectors is tied to a specified 1) level of emissions, 2) level of product used, such as coatings or fuel, or 3) production level. The three Phases have staggered initial reporting deadlines falling between 2023 and 2027. Reporting is further staggered according to whether the facility is in District Group A or B, with District Group A commencing reporting first. The District Groups are comprised of the local and regional air districts in California, with the Bay Area, Imperial County, Sacramento Metropolitan, San Diego County, San Joaquin Valley, and South Coast Air Districts in District Group A and the remaining 29 air districts in District Group B. After an initial report, all District Group A

facilities will submit an annual report commencing in 2027, and all District Group B facilities submitting annual reports starting in 2028.

Abbreviated Reporting

Under the amendments, about 24,000 of the facilities subject to reporting, or approximately 40 percent, will be eligible for abbreviated reporting. Abbreviated reporting allows a facility to omit certain data from the facility's annual report, including information on devices at the facility, emissions data, data on release locations associated with each process, and data on each process associated with a device at the facility. Abbreviated reporting still requires the reporting of certain data on prescribed activity levels for each permitted process at the facility.

Effect of the Amendments

In the rulemaking, CARB cited to multiple federal and state statutes that authorize and require the agency to collect, evaluate, and make publicly available facility emissions data, including the National Emissions Inventory, AB 2588, AB 617, and AB 197. For regulated facilities, CARB stated that a key benefit of the amendments is the harmonization of statewide data submission requirements, such as reporting deadlines, frequency of reporting, and the specific chemical substances and other data required to be reported. Making data collection activities more consistent across programs provides efficiency. CARB also noted that improved inventory data is an essential element in the development of cost-effective solutions to meet state and federal mandates to reduce air pollution and protect human health.

Conclusion and Implications

CARB found that approximately 50,000 small businesses would be affected by the amendments to the Regulation. CARB estimated that compliance with the amended Regulation over a ten-year period would lead to an increase in costs of approximately $67.4 million for affected private sector facilities. But, with initial set-up and annual ongoing costs for compliance relatively low, and much of the required data already currently being collected by facilities, and in some instances reported, the amendments are not expected to have a significant material financial impact.
(Allison Smith)

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RECENT FEDERAL DECISIONS

FOURTH CIRCUIT DELIVERS ANOTHER SETBACK FOR THE MOUNTAIN VALLEY PIPELINE'S RELIANCE ON NATIONWIDE PERMIT 12

Sierra Club v. U.S. Army Corps of Engineers, ___F.3d___, Case No. 20-2039 (4th Cir. Dec. 1, 2020).

On December 1, 2020, the U.S. Court of Appeals for the Fourth Circuit struck another blow to the proposed Mountain Valley Pipeline (MVP), a proposed 303-mile natural gas pipeline to be located in Virginia and West Virginia, by granting a stay of the U.S. Army Corps of Engineers (Corps) authorization to proceed under Nationwide Permit (NWP) 12. The *per curiam* opinion, effectively blocking installation of the MVP found the petitioners are likely to succeed on the merits of their claim that the Corps erred when it incorporated state conditions into the regional NWP 12 permit. However, the court found that the petitioners were unlikely to succeed on their claim that NWP 12 was unlawfully adopted because the Corps failed to consult with the U.S. Fish and Wildlife Service (FWS) because this claim must be first brought at a U.S. District Court.

Background

NWP 12, most recently reissued by the Corps in 2017, authorizes dredge and fill in waters of the United States associated with the construction, maintenance, repair, and removal of utility lines, including natural gas and oil pipelines, electric lines, and related facilities. Projects eligible for coverage under NWP 12 may avoid the more onerous individual clean water act permitting process for dredge and fill activities. On September 15, 2020, the Corps published a proposed rulemaking that the Corps plans to reissue the Corps' 52 existing NWPs and issuance of five new NWPs. *See,* Proposal To Reissue and Modify Nationwide Permits, 85 Fed. Reg. 57,298 (Sept. 15, 2020).

Whether projects obtain coverage for discharges to "waters of the United States" under nationwide or individual permits, state water quality certifications under § 401 of the federal Clean Water Act must also be obtained. 33 U.S.C. § 1341(a)(1). States may choose to add special conditions to the regional NWPs that are applicable to all projects covered under a NWP within their jurisdiction. 33 U.S.C. 1341(d).

The Current Litigation

The Fourth Circuit has examined issues regarding special conditions and NWP 12 for the MVP before. On November 27, 2018, the Fourth Circuit vacated a previous verification issued by the Corps that the MVP was eligible for coverage under NWP 12. *Sierra Club v. U.S. Army Corps of Engineers*, 909 F.3d 635 (4th Cir. 2018). In the 2018 ruling, two flaws were found. First, the court ruled that the Corps lacked the authority to substitute its own condition for a special condition it had already adopted into the NWP at the request of West Virginia. Second, the court determined that West Virginia erred when it waived a state imposed special condition found in NWP 12 without a formal rulemaking process.

The current round of litigation is in response to the Huntington and Norfolk Districts of the Corps issuing verifications on September 25, 2020 that the MVP was eligible for coverage under NWP 12. The Sierra Club and other groups filed petitions for agency review and motions to stay the actions of the Corps in the Fourth Circuit, arguing that: 1) the verification made by the Huntington District of the Corps made illegal modifications to NWP 12 to accommodate state conditions; and 2) the verifications are unlawful because the Corps violated the Endangered Species Act when it reissued NWP 12 in 2017 because it did not consult with the United States Fish and Wildlife Service.

The Fourth Circuit's Decision

The Corps Improperly Adopted a Modified State Special Condition into NWP 12

The Fourth Circuit found that the petitioners were likely to succeed on their claim that the Corps

improperly adopted a special condition recently modified by the State of West Virginia into NWP 12. When NWP 12 was reissued in 2017, it included several special conditions from the State of West Virginia, including Special Condition A. When adopted, Special Condition A required individual 401 Certifications for all pipelines proposed for installation in the state greater than 36 inches in diameter or pipelines crossing a navigable or § 10 waterway. The MVP project is larger than 36 inches in diameter and crosses multiple § 10 waterways. The 2018 ruling by the Fourth Circuit, discussed above, found that West Virginia could not waive the individual 401 Certification requirement without a formal rulemaking process.

In response to the 2018 ruling, West Virginia modified Special Condition A, through a formal rulemaking process, to provide the state with discretion to waive the individual 401 certification requirement. West Virginia then used this discretion to issue a general 401 certification to MVP. At the request of West Virginia, the Corps Great Lakes and Ohio River Division Engineer then incorporated this modified Special Condition A into NWP 12 and verified MVP coverage under NWP 12.

Although, this time, West Virginia followed its rulemaking procedures to modify Special Condition A, the court ruled it is unlikely that the Corps Division Engineer has the authority to adopt the modified Special Condition A into NWP 12. The Clean Water Act provides that if a state chooses to add a special condition to the use of a NWP within its borders, those conditions shall become part of the NWP. 33 U.S.C. 1341(d). However, only the Chief Engineer of the Corps is authorized to issue, modify or revoke an NWP. 33 U.S.C. 1344(d)-(e). A Division Engineer, such as the one who acted to adopt Special Condition A, may adopt special conditions, however, they may only do this prior to the Chief Engineer issuing or reissuing such NWPs. *See,* 33 C.F.R. 330.4(c)(2). Thus, while the Division Engineer may have acted appropriately in adopting Special Condition A, it would not take effect until the Chief Engineer reissues NWP 12.

The Court of Appeals Lacks Jurisdiction to Review NWP 12's Compliance with the Endangered Species Act

The Fourth Circuit did not find that the petitioners were likely to succeed on their other claim, that NWP 12 is invalid because the Corps failed to engage in programmatic consultation under § 7 of the federal Endangered Species Act with the FWS before reissuing NWP 12 in 2017. Some of the same petitioners in the MVP litigation were successful with this claim in the Federal District Court of Montana. That ruling, issued on April 15, 2020 in *Northern Plains Resource Council v. U.S. Army Corps of Engineers*, Case No. 4:19-cv-00044 (D. Mont.), has since been appealed to the Court of Appeals for the Ninth Circuit. Case No. 20-35412 (9th Cir.).

However, in this case, the Fourth Circuit found that the petitioners were unlikely to prevail because the court likely lacks the subject matter jurisdiction. The court found that District Courts have general jurisdiction for questions of federal law. Initial review of agency decisions may only occur at the appellate level when a statute specifically provides this subject matter jurisdiction. The petitioners argued that the Natural Gas Act provides such jurisdiction here because the Corps verification is an action of a federal agency to "issue, condition, or deny" a permit, license, etc. required for a natural gas facility. *See,* 15 U.S.C. 717r(d)(1). However, the court found this provision did not apply because, in substance, the petitioners were not seeking review of the Corps verification that the pipeline project was eligible for coverage under NWP 12. Rather the petitioners were challenging the Corps' decision to reissue NWP 12, which is unrelated to this project. Thus, the Natural Gas Act did not apply. The court also noted that petitioners do not contend that they cannot pursue a challenge in District Court, as several of the same petitioners successfully brought this challenge in the District Court of Montana.

Conclusion and Implications

The future of the Corps authorization for the MVP is still to be decided as the Fourth Circuit may still hear the case on the merits. The State of West Virginia and the Corps may also have an opportunity to remedy the issues with the NWP 12 special conditions that have plagued this project as the Corps has proposed reissuing all NWPs.
(Darrin Gambelin)

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FIFTH CIRCUIT FINDS EPA HAS AUTHORITY TO ALTER STATES' PROPOSED CAA DESIGNATIONS OF ATTAINMENT STATUS

State of Texas v. U.S. Environmental Protection Agency, ___F.3d___, Case No. 18-60606 (5th Cir. Dec. 23, 2020).

How much discretion does the U.S. Environmental Protection Agency (EPA) wield when promulgating (non)attainment status for sub-state geographic areas under the federal Clean Air Act (42 U.S.C. § 7401 *et seq*., (CAA))? Texas argued that EPA lacked discretion to alter its proposed designation of Bexar County as compliant with, *i.e*., in attainment, CAA ozone standards, because Texas submitted modeling demonstrating that the County would cure it current non-compliance within the five-year compliance period. The Fifth Circuit Court of Appeals disagreed.

Background

In 2015, EPA promulgated updated the National Ambient Air Quality Standard (NAAQS) for ozone from 0.075 parts per million (ppm) to 07 ppm as a result of the required five-year review of NAAQS. 42 U.S.C. § 7409(d)(1). The states were thereafter required to submit to EPA a list of all areas or portions thereof in the state, designating each area as nonattainment, attainment, or unclassifiable. (*See: Am. Trucking Ass'n v. EPA*, 283 F.3d 355, 3580359 (D.C. Cir. 2002), 42 U.S.C. § 7407(d)(1)(A)). The EPA Administrator then must "promulgate" the designations submitted by the states, "mak[ing] such modifications as the Administrator deems necessary to the [states'] designations of the areas." 42 U.S.C. § 7407(d)(1)(B)(ii).

An area meeting the NAAQS is designated as "attainment" (42 U.S.C. § 7407(d)(1)(A)(ii)), while an area that "cannot be classified on the basis of available information as meeting or not meeting the [NAAQS] for the pollutant" is designated unclassifiable. 42 U.S.C. § 7407(d)(1)(A)(iii).

An area is designated nonattainment if it:

> . . .does not meet (or. . .contributes to ambient air quality in a nearby area that does not meet) the national primary or secondary ambient air quality standard for the pollutant. 42 U.S.C. § 7407(d)(1)(A)(i).

Nonattainment areas are further classified as marginal, moderate, serious, severe, or extreme, depending on the severity of air pollution. *See*, 40 C.F.R. § 51.1303 (2018). The higher a county's nonattainment classification, the more stringent the air planning requirements are to bring the county back into compliance. 42 U.S.C. §§ 7511, 7511a.

Texas' 2018 submission to EPA designated Bexar County as nonattainment for ozone, based on certified monitoring results for 2013-2015 of 0.78 ppm. However, one-year later, Texas asked EPA to allow the state more time to show that additional data and considerations warranted an attainment designation for Bexar County. In 2018, Texas asserted to the Administrator that Bexar County qualified for an attainment designation as the state's modeling "projected" that the county would "satisfy the 2015 NAAQS by 2020, and that projected compliance is sufficient to support an attainment designation."

The EPA Administrator did not agree, and following a notice and comment period EPA designated Bexar County as a marginal nonattainment area "based on air quality monitoring from the 3 most recent years of certified data, which are 2015-2017."

The Fifth Circuit's Decision

Does EPA Have the Power to Change a State's Proposed Designation?

Texas' petition challenging the nonattainment designation of Bexar County argued that EPA lacks discretion to change a state's proposed designation unless the change is "necessary," *i.e*., "meaning that it is unavoidable and must be done." Applying *Chevron* deference, the Fifth Circuit disagreed. *BCCA Appeal Grp. v. EPA*, 355 F.3d 817, 824 (5th Cir. 2003), citing *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842–43 (1984).

Asking first "'whether Congress has directly spoken to the precise question at issue' or whether, instead, the statute is ambiguous" (*Exelon Wind 1, L.L.C. v. Nelson*, 766 F.3d 380, 392 n.10 (5th Cir. 2014)),

the Court of Appeals concluded that "'Congress has spoken directly to the' question of when EPA may modify a state's proposed attainment designation." *Chevron*, 467 U.S. at 842-843. While Texas focused on 42 U.S.C. § 7407(d)(1)(B)(ii)'s use of the word "necessary," the court placed that word in the context of the subsection, which provides that the Administration may "make such modifications as the Administrator *deems* necessary to the [states'] designations of the areas." (Emphasis added.)

> If we were looking at the word "necessary" in isolation, we might agree with Texas.[2] However, the word does not exist in a vacuum. It is part of a larger scheme, one which grants discretion to the Administrator to make modifications that it "deems necessary." If Congress had said instead that the Administrator may only make changes "when necessary," Texas's argument might have more merit. Because the statute says that the Administrator "may" make changes that it "deems necessary," however, it is clear that Congress has delegated discretionary authority to EPA to determine when adjustments should be made.

Under *Chevron*'s second step, the court asked "whether EPA's construction of the statute is permissible." EPA's regulations provide that a state's proposed designation may be changed when it is "inconsistent with the statutory language." 83 Fed. Reg. at 31,138/1:

> Thus, 'any area that does not meet the [NAAQS]' must be designated 'nonattainment,' even if the state initially designated it as 'attainment.' 42 U.S.C. § 7407(d)(1)(A).

Claim of Arbitrary and Capricious Conduct by the Administrator

Texas also argued that the Administrator acted arbitrarily and capriciously in ignoring Texas' reliance on modeling showing that Bexar County would reach attainment by 2020 (*i.e.*, the close of the five-year period during which the 0.07 ppm NAAQS would be in effect). Texas relied on a Dictionary Act provision providing that "unless the context indicates otherwise …words used in the present tense include the future as well as the present." 1 U.S.C. § 1.

> According to Texas, this means that when 42 U.S.C. § 7407(d)(1)(A)(i) says that any county that 'does not meet' the NAAQS should be designated nonattainment, what the statute really means is that any county that 'does not [now, and will not in the future,] meet' the NAAQS should be designated nonattainment.

The Court of Appeals was not persuaded. "The future-tense presumption applies only where context does not indicate otherwise." Here, the CAA states an area must be designated nonattainment if it "does not meet" the NAAQS. 42 U.S.C. § 7407(d)(1)(A)(i):

> An area designated as "marginal" nonattainment (such as Bexar County) must then meet the NAAQS within three years. 42 U.S.C. § 7511(a)(1); 40 C.F.R. § 51.1303 (2018). It would be contradictory for EPA to require marginal nonattainment areas to comply within three years if projected compliance within three years triggered an attainment designation.

Conclusion and Implications

The Fifth Circuit's straightforward application of *Chevron* analysis to the statutory language was likely buttressed by more recent monitoring data showing that Bexar County had not achieved compliance with the ozone NAAQS, contrary to what Texas' modeling had predicted. The court's opinion is available online at: http://blogs.edf.org/climate411/files/2020/12/18-60606-Opinion.pdf
(Deborah Quick)

DISTRICT COURT BACKS WASHINGTON STATE DEPARTMENT OF ECOLOGY REGARDING A BAN ON VESSEL SEWAGE DUMPING IN PUGET SOUND

American Waterways Operators v. Wheeler, ___F.Supp.3d___, Case No. 18-cv-02933 (D. D.C. Nov. 30, 2020).

The U.S. District Court for the District of Columbia recently declined to allow the U.S. Environmental Protection Agency (EPA) to take back and reconsider its decision allowing the Washington State Department of Ecology (Ecology) to impose a vessel sewage dumping ban in Puget Sound prior to ruling on aspects of the merits of what had become a multiparty high profile dispute.

Background

The case arose for judicial review of decisions made by EPA pursuant to federal Clean Water Act, § 312(f)(3). That subsection permits no discharge zones to be established in particular circumstances:

> (3) After the effective date of the initial standards and regulations promulgated under this section, if any State determines that the protection and enhancement of the quality of some or all of the waters within such State require greater environmental protection, such State may completely prohibit the discharge from all vessels of any sewage, whether treated or not, into such waters, except that no such prohibition shall apply until the Administrator determines that adequate facilities for the safe and sanitary removal and treatment of sewage from all vessels are reasonably available for such water to which such prohibition would apply. Upon application of the State, the Administrator shall make such determination within 90 days of the date of such application. (33 USC § 1322)

EPA initially granted Washington authorities the right to declare a No-Discharge Zone (NDZ) in the Sound. Some 40,000 comments had been submitted in response to the rule under consideration. The state proceeded to establish the ban. Some major shipping interests sued the EPA thereafter, alleging that the EPA had failed to account for the costs involved in meeting the requirements of the ban. Apparently under pressure from commercial shipping companies, EPA responded to the lawsuit by seeking to stipulate that it had erred, and sought a remand to reconsider its ruling. The U.S. District Court (Judge Amit Mehta) denied the remand and the parties (including environmental groups arguing that EPA was correct in its ruling), the state, and the shipping companies made and extensively briefed cross motions for summary judgment.

The District Court's Decision

The case is notable for at least two facets of the decision. The initial portion of the decision reviewed and analyzed whether justice would be better served by remand or by hearing the case. The court determined, somewhat ironically, that unless the EPA had benefit of the court's judgment on what economic consideration is relevant under the federal Clean Water Act's terms for allowing an NDZ, there could be a decision in a legal vacuum that created undue uncertainties for all parties, as well as risk to the Puget Sound. It followed that he usual saving of judicial effort and time that justified most remands would not necessarily materialize in the context of the Puget Sound dispute.

EPA's Decision, Economic Factors and Judicial Guidance

The court then turns to the merits of the EPA decision, which were at issue between the parties in court. The court emphasized that the review of the EPA decision is based on the record in front of the agency. The court then explored the parameters of arbitrariness and compliance with the law, beginning with the relevance of economic factors.

The court looked to the leading precedents from the U.S. Supreme Court on when courts should rule that agencies must or cannot consider economic costs in reaching their determinations. The District Court looked to holdings and statutory terms under review in two Clean Air Act cases: *Whitman v. American Trucking* Associations, 531 U.S. 457 (2001); and *Michigan v. U.S. EPA*, 576 U.S. 743 (2015) for guidance.

The *Whitman* case the involved the EPA's ability to issue National Ambient Air Quality Standards under Sections 108 and 109 of the federal Clean Air Act. The Supreme Court reversed the ruling of the Court of Appeals, holding that the EPA's interpretation of Sections 108 & 109 of the Clean Air Act did not unconstitutionaly delegae legislative power to the EPA, though the EPA's implementation policy for the 1997 Ozone NAAQS had been unlawful. (*See:* https://ballotpedia.org/Whitman_v._American_Trucking_Associations).

The *Michigan* case the Supreme Court held that cost considerations were required under a provision directing the EPA to regulate power plant if such regulation was "appropriate and necessary." (*See:* https://harvardlawreview.org/2015/11/michigan-v-epa/)

Read together, *Whitman* and *Michigan* stand for the proposition that whether an agency is required to consider costs depends on the breadth of the statutory text and the degree to which it compels the agency to balance costs and benefits. Since the Supreme Court decided *Michigan*, courts in the D.C. Circuit have helpfully fleshed out the *Whitman—Michigan* dichotomy. For example, in *Utility Solid Waste Activities Group v. EPA*, the D.C. Circuit concluded that EPA was not required to consider costs when determining whether a waste site should be classified as an "open dump." 901 F.3d 414, 448-49, 438 (D.C. Cir. 2018).

Section 312(f)(3)

Armed with judicial precedent, the District Court looked at the specific terms of § 312(f)(3), looking for similarities with either of the two lodestar cases. The court found that the language of the section requiring analysis of "reasonable availability" of disposal facilities and other terms dictate that *economics are in play*. The court found that the EPA did err by failure adequately to analyze cost and benefit of the Puget Sound DNZ, and that a remand would be appropriate.

Conclusion and Implications

The court went on to deal with contentions of the parties as to the adequacy of other aspects of the record and EPA's decision-making. Given the specialized nature of an NDZ rule, most of those are very much issue specific discussions that do not bear repeating here. However, the court did determine that although there will be a remand ordered, it should not include a *vacatur*, or repeal, of the rule that was issued. This is because the record evidence assembled but not adequately parsed and evaluated by EPA does lend credence to the belief that in the end the NDZ costs will be found less than the benefits. The court also found that the state has the exclusive role in deciding there is need for an NDZ under the wording of the law; EPA is not authorized to second guess that judgement.

In addition to fleshing out the law of NDZ determinations, the decision presents an excellent review of some of the leading cases that frame and affect the outcome of judicial review under major environmental statutes, including the Clean Water Act.
(Harvey M. Sheldon)

DISTRICT COURT ADDRESSES LESSOR LIABILITY UNDER THE CLEAN WATER ACT FOR VIOLATIONS OF FORMER TENANTS UNDER A TERMINATED GENERAL PERMIT

Puget Soundkeeper Alliance v. APM Terminals Tacoma, LLC, ___F.Supp.3d___,
Case No. C17-5016 BHS (W.D. Wash. Nov. 17, 2020).

The U.S. District Court for the Western District of Washington recently granted in part and denied in part motions for summary judgment following a lengthy docket on a federal Clean Water Act (CWA) case regarding liability for successor permittees. The court ruled that once a permit holder has terminated its lease, and terminates its permit, violations of the CWA are not considered ongoing as to the lessor. Therefore, the Port was not held liable for violations of its former lessee.

Factual and Procedural Background

APM Terminals Tacoma, LLC (APM) secured a lease with the Port of Tacoma (Port), and obtained

an Industrial Stormwater General Permit (ISGP) to discharge pollutants near the Tacoma Port. In a 2013 annual report, APM admitted to exceeding established benchmarks for pollutants for all four quarters, resulting in Level 1, 2, and 3 corrective action requirements under the ISGP.

In 2017, following discussions with the Washington Department of Ecology (Ecology) to consider corrective actions, including the construction of a new stormwater treatment system, APM terminated its lease, and the Port assumed the design and construction of the stormwater treatment system. Thereafter, the Port applied for a new ISGP through Ecology. Following public comment, Puget Soundkeeper Alliance (Soundkeeper) opposed the new ISGP, indicating in their opposition that the ISGP needed to either include an administrative order for the Port to implement Level 3 corrective actions or to transfer APM's ISGP to the Port.

In October 2017, Ecology issued the new ISGP and signed an Agreed Order with the Port agreeing to implement best management practices, create a new Stormwater Pollution Prevention Plan (SWPPP), and construct the stormwater treatment system by September 30, 2018.

Plaintiff Soundkeeper filed its complaint in January 2017 against APM for the violation of the National Pollutant Discharge Elimination System (NPDES), listing the Port as a defendant in an amended complaint in November 2017. After a series of amended complaints, Soundkeeper and the Port filed cross motions for summary judgment.

Soundkeeper moved for partial summary judgment that it had standing to bring the action, that the Port is jointly liable for alleged violations that occurred during APM's tenancy, that the Port is liable for failing to monitor discharges from the wharf and to identify the wharf in its Stormwater Pollution Prevention Plan. The Port moved for summary judgment on Soundkeeper's entire claim against the Port.

The District Court's Decision

A moving party is entitled to judgment when the nonmoving party fails to make a sufficient showing on an essential element of a claim on which the nonmoving party has the burden of proof.

Soundkeeper's Motion for Summary Judgment and Standing

The court first considered Soundkeeper's motion for summary judgment. The court considered and rejected four arguments raised by the Port and determined that Soundkeeper had standing to sue under the CWA citizens suit provision. The Port first argued that standing and subject matter jurisdiction should be determined after the completion of discovery. The court rejected this argument, reasoning that standing was a threshold question to be considered before the merits. Additionally, subject matter jurisdiction can be raised at any time, including before discovery.

Second, the Port argued that Soundkeeper failed to bring sufficient evidence to establish an injury in fact, as the Port's discharges only had minimal impact on Commencement Bay. The court found that the Port failed to provide adequate authority on its proposition and found for Soundkeeper's authority, which expanded injuries due to CWA violations. Thus, the court found that Soundkeeper provided sufficient evidence to establish an injury in fact.

Third, the Port argued that Soundkeeper had failed to establish the element of causation. The court found this argument without merit as causation is not an element of standing. Rather, courts must consider whether the injuries are "fairly traceable" to the Port's alleged CWA violations.

Fourth, the Port argued that Soundkeeper failed to bring forth redressable claims because the Port was not violating the CWA. However, the court determined that this argument goes to the merits and cannot be used to determine whether Soundkeeper may bring a claim under the citizens' suit provision. Therefore, redressability was not at issue in determining standing for Soundkeeper.

Soundkeeper's Motion for Summary Judgment and Level 3 Violations Liability

The court next considered two arguments related to the Port's liability for the Level 3 corrective actions. First, Soundkeeper argued the Port was liable because the Port managed and oversaw its lessee, APM. The court recognized that the CWA holds those who violate CWA provisions and permits accountable regardless of whether they are a permit holder, however, this determination is a fact-based analysis.

Second, the Port argued that even if the Port was responsible for permit violations, the violations ceased when APM terminated its lease and were not ongoing. Soundkeeper filed the complaint after APM terminated its lease and after APM's permit was terminated. Rather than transfer APM's permit to the Port, Ecology entered into an Agreed Order with the Port to correct the actions of APM. Because Soundkeeper failed to oppose the transfer during public comment and provided no authority to support the proposition that a lessor's alleged violations are continuous after a permit has been terminated, the court denied Soundkeeper's summary judgement and granted the Port's.

Soundkeeper's Motion for Summary Judgment and the Wharf

The court next considered Soundkeeper's argument that the Port was liable for failing to monitor discharges from the wharf and failing to identify the wharf in its SWPPP. The court quickly found for the Port because the wharf was not covered by the ISGP. Thus, Soundkeeper's argument that the Port was liable for its failure in monitoring discharges from the wharf as well as identifying the wharf in the stormwater pollution prevention plan was moot.

The Port's Motion for Summary Judgment

Finally, the court considered the Port's motion for summary judgment on Soundkeeper's claim of liability for the Level 3 corrective actions required for the violation of the ISGP. The court determined that the Port could not be held liable for the violations of APM, as APM had terminated its ISGP when it terminated its lease with the Port. So, while the Port had applied for a new permit and entered into an Agreed Order with Ecology to establish a new stormwater treatment system and commence corrective actions for the former violations, the Port's permit allowed this to be completed by September 30, 2019 at the earliest. Thus, Soundkeeper's decision to file complaint for violations of the Port's ISGP was premature. The court found that the Port was in violation of its Agreed Order with Ecology, however, it was not determined whether a violation of an Agreed Order was grounds for a citizen suit. Thus, the court granted the Port's motion for summary judgement on Soundkeeper's claim of liability for the Level 3 corrective actions.

Conclusion and Implications

A current permit holder cannot be liable for violations that occurred prior to the transition of permit holders, unless the violation is continuous and ongoing. Here, APM's violations ceased when it terminated its permit. Therefore, the Port, as owner and lessor, could not be held liable. The court's ruling is available online at:
https://casetext.com/case/puget-soundkeeper-alliance-v-apm-terminals-tacoma-llc-4
(Kara Coronado, Rebecca Andrews)

DISTRICT COURT HOLDS ISSUANCE OF NEW NPDES PERMIT DOES NOT MOOT CLAIMS FOR VIOLATIONS OF PRIOR PERMIT IF NEW PERMIT IS STAYED

Sierra Club, Inc. v. Granite Shore Power LLC, ___F.Supp.3d___, Case No. 19-cv-216-JL (D. N.H. Nov. 25, 2020).

The U.S. District Court for New Hampshire recently determined that allegations of violations of a 1992 federal Clean Water Act, National Pollutant Discharge Elimination System (NPDES) permit were not moot even after issuance of a new permit, where the effectiveness of the new permit was subject to a stay while undergoing appellate review. The court also denied defendants' motion for partial summary judgment as to plaintiffs' claim that defendants violated reporting requirements in the 1992 discharge permit, finding that genuine disputes of material fact remained regarding the meaning of the reporting requirement.

Factual and Procedural Background

Granite Shore Power LLC and GSP Merrimack LLC (collectively: Granite Shore) own Merrimack Station, a coal-fueled power plant that discharges

heated water into a shallow, impounded section of Merrimack River known as Hooksett Pool. In 1992, the U.S. Environmental Protection Agency (EPA) issued an NPDES permit for Merrimack Station (1992 Permit). The 1992 Permit limited thermal discharges and required regular monitoring and reporting of the river water temperature and dissolved oxygen content. Originally set to expire in 1997, the permit was administratively continued and remained fully effective and enforceable under EPA regulations.

In 2011, EPA issued a new, draft NPDES permit for Merrimack Station (2011 Draft Permit). EPA's draft determinations for the 2011 Draft Permit noted that Merrimack Station's thermal discharges had caused or contributed appreciable harm to the Hooksett Pool's balanced, indigenous community of fish. Issuance of a final permit was delayed several times. According to EPA, this delay was due in part to certain factual and legal developments, including, among other things, EPA's revised understanding of the thermal data evaluated in the 2011 Draft Permit.

In 2019, Sierra Club, Inc. and Conservation Law Foundation, Inc., (plaintiffs) brought suit in the District Court against Granite Shore alleging violations of three conditions in the 1992 Permit. Plaintiffs alleged violations related to thermal discharge limitations and violations of the annual reporting condition.

In May 2020, EPA issued a final permit that would take effect in September 2020 (2020 Permit) and supersede the 1992 permit. Prior to the 2020 Permit's effective date, Granite Shore and plaintiffs challenged different conditions in the 2020 Permit to the Environmental Appeals Board (EAB). As a result, the contested 2020 Permit conditions were stayed, and the corresponding 1992 Permit provisions remained in effect pending final agency action. Thereafter, Granite Shore moved for summary judgment in the District Court case, alleging that plaintiffs' claims were moot as a result of the issuance of the 2020 Permit. Granite Shore also moved for partial summary judgment as to plaintiffs' claim that it violated the annual reporting condition.

The District Court's Decision

Claim of Mootness

The District Court first addressed Granite Shore's argument that the plaintiffs' claims were moot because the 2020 Permit removed and replaced the 1992 Permit conditions at issue in the plaintiffs' complaint. A case is moot when the issues presented are no longer "live" or the parties lack a cognizable interest in the outcome. However, as long as the parties have even a small concrete interest in the outcome of the litigation, the case is not moot. The court's primary inquiry was whether adjudication of the issue would grant meaningful relief.

In reviewing Granite Shore's mootness argument, the District Court noted that lawsuits based on a defendant's violations of a rule have been rendered moot by the enactment of a superseding rule with which the defendant complies. However, the court determined that the 1992 Permit conditions at issue in the present case were not superseded by the corresponding 2020 Permit conditions, because those conditions were contested and therefore stayed pending the appeal before the EAB and final agency action. The court held that because the relevant 1992 Permit conditions remained in effect, the controversy involving those permit conditions was not moot.

Granite Shore also argued that the plaintiffs' complaint was moot because it was premised on EPA's 2011 assessment regarding the harm caused to the Hooksett Pool, which the EPA had abandoned. The court interpreted this argument as mootness based on voluntary cessation. In order for defendants' argument to succeed, defendants needed to show that they were no longer violating the 1992 Permit and that it was absolutely clear that the alleged permit violations could not reasonably be expected to recur. Unpersuaded by defendants' argument, the court concluded that defendants failed to establish that there was no genuine dispute of material fact on these points.

Motion for Partial Summary Judgment

The District Court next addressed Granite Shore's motion for partial summary judgment as to plaintiffs' claim that defendants were violating the 1992 Permit's reporting requirements by providing statistical summaries of certain data rather than the entirety of the continuous data collected. Granite Shore argued that summary judgment was proper because they had complied with their interpretation of the relevant reporting condition, which they asserted was unambiguous.

NPDES permits are interpreted as contracts. Be-

cause the 1992 Permit is a contract with the federal government, it is interpreted under the federal common law of contracts. The core principle of contract interpretation requires that unambiguous contract language be construed according to its plain and natural meaning. If ambiguities remain after analyzing the plain language, ultimate resolution of the meaning typically turns on the parties' intent. As such, summary judgment based on contract interpretation is appropriate only if the language's meaning is clear, considering the surroundings circumstances and undisputed evidence of intent, and there is no genuine issue as to the inferences which might reasonably be drawn from the language.

Plaintiffs argued that the 1992 permit required "continuous" monitoring of data, and thus the condition that "[a]ll . . . monitoring program data be submitted" required Granite Shore to report the entirety of the data collected through continuous monitoring." In contrast, Granite Shore contended that "all" modified the term "program" and referred to "categories" of data that must be reported and maintained. Granite Shore also argued that other language in the 1992 Permit indicated that the monitoring data reported should be "representative" of the data collected, and not the entirety of the data collected. The District Court held that both of these interpretations were reasonable and therefore the plain language of the contested condition was ambiguous.

The court then turned to the "intent manifested" by the contested reporting condition. Granite Shore argued that EPA consistently accepted their annual reports as compliant and that the EPA included a temperature reporting requirement in the 2020 Permit that, according to EPA, follows "the format from the 2018-2019" annual reports. Plaintiffs countered that EPA's failure to contest the adequacy of the annual reports was due in part to "bureaucratic inattention" as evidenced by the long delay in issuing a new NPDES permit and EPA's failure to evaluate annual reports. As evidence of the inadequacy of the annual reports, plaintiffs pointed to a 2015 EPA request for the water temperature data used to create the annual report summary statistics from three stations covering the periods from April to October, from 1984-2004. The court found that the parties' theories as to the intent of the reporting condition raised genuine issues of material fact. Thus, the District Court denied the motion for partial summary judgment because genuine disputes of material fact remained as to the meaning of the reporting requirement and Granite Shore's compliance with it.

Conclusion and Implications

This case elucidates the key inquiry under the mootness doctrine. That is, when reviewing whether a claim is moot, the core question before the court is whether the controversy is presently live. The case also shows the difficulty in succeeding on a motion for summary judgment based on a disputed interpretation of an arguably ambiguous contract condition. The court's opinion is available online at: https://www.govinfo.gov/content/pkg/USCOURTS-nhd-1_19-cv-00216/pdf/USCOURTS-nhd-1_19-cv-00216-0.pdf
(Heraclio Pimentel, Rebecca Andrews)

DISTRICT COURT FINDS DOJ MUST DETERMINE WHETHER CIVIL ENFORCEMENT AGENCIES POSSESS DISCOVERABLE MATERIALS IN DIESEL EMISSIONS PROSECUTION

U.S. v. Palma, ___F.Supp.3d___, Case No. 19-20626 (E.D. Mich. Nov. 17, 2020).

Various federal criminal prosecutions continue to unroll alleging violations of the federal Clean Air Act (42 U.S.C. § 7401 *et seq*., (CAA)) as part of a conspiracy to market vehicles that did not meet emissions standards when operated under normal conditions. This federal case survived a motion to dismiss for failure to provide sufficient details in the indictment, but the Department of Justice (DOJ) was ordered to conduct an affirmative investigation to determine whether materials held by federal and state civil enforcement agencies were required to be disclosed to the defendant.

Background

In 2007, Emanuele Palma took a job as an engineer "specializ[ing] in the calibration of diesel vehicle engines" with VM Motori, an Italian engine manufacturer. VM Motori supplied engines to Fiat Chrysler Automobiles (FCA), and in 2012 Palma moved to the Michigan office of VM Motori's North American affiliate to work directly with FCA to develop and calibrate a new diesel engine, which was used in the Model Year 2014-2016 versions of FCA's Jeep Grand Cherokee and Ram 1500 vehicles (Subject Vehicles). VM Motori was subsequently acquired by FCA, and in 2016 Palma became an FCA employee.

FCA and VM Motori, including Palma, sought "certificates of conformity" from the U.S. Environmental Protection Agency (EPA) for the Subject Vehicles, confirming that the vehicle complies with the relevant CAA regulations, including "emissions standards" limiting the amounts of nitrogen oxide (NOx) engines may emit, as well as the equivalent document (an Executive Order) from the California Air Resources Board (CARB).

Following EPA's September 2015 notification that it would "perform additional emissions testing" of the Subject Vehicles, a June 2016 meeting occurred among FCA, EPA, CARB and DOJ "to discuss regulators' concerns. Approximately one month later, after [Palma] returned from visiting family in Italy, two federal agents—one from the FBI and one from the EPA—came to [Palma's] home and questioned him for more than ninety minutes. Palma was indicted and arrested three years later. The counts included conspiracy to mislead regulators, consumers and "the public" and wire fraud based on underlying alleged violations of the CAA's prohibition on "knowingly. . .mak[ing] any false material statement, representation, or certification in, or omit material information from" regulatory submissions under the Act. 42 U.S.C. § 7413(c)(2)(A).

Palma moved to, *inter alia*, dismiss the counts alleging violations of the CAA, and sought additional discovery from DOJ.

The District Court's Decision

Palma sought dismissal of the CAA counts on the basis that "the indictment does not allege that he was responsible for the submissions" seeking certifications of conformance from the EPA and that, with respect to certain counts, "the indictment fails to identify the specific misstatements or omissions" in the regulatory submissions. The District Court concluded that the indictment met the legal standard as "a plain written statement of the essential facts constituting the offense charged," and was sufficient as it included: 1) "the elements of the offense charged and fairly informs the defendant of the charge against which he must defend," and 2) "enables the defendant to pled an acquittal or conviction in bar of future prosecutions for the same offense. Fed. Rule of Crim. Proc. 7(c)(1), *Hamling v. U.S.*, 418 U.S. 87, 117 (1974):

> To survive a motion to dismiss, the indictment must assert facts which in law constitute an offense, and which, if proved, would establish prima facie the defendant's commission of that crime. *U.S. v. Landham*, 251 F.3d 1072, 1079 (6th Cir. 1994).

The indictment of Palma, per the District Court:

> Track[s] the statutory language, cite[s] the elements of the crime charged, and provide[s] approximate dates and times. And each count identifies one specific document submitted by FCA in support of its certification applications for the Subject Vehicles. That [Palma] was not employed by FCA at the time of these submissions or directly responsible for the certifications does not preclude a finding that he knowingly caused any misstatements or omissions. Nor is the indictment required to explain which information is alleged to be false or omitted from the documents. In sum, the indictment fairly informs [Palma] of the charges regarding violations of the Clean Air Act and enables him to plead an acquittal or conviction in bar of future prosecutions for the same offenses. Thus, these counts survive [Palma's] motion.

Discovery Issues

Separately, Palma sought additional discovery pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), and Federal Rule of Criminal Procedure 16. The *Brady* doctrine requires the government to provide criminal defendants "with material, exculpatory evidence in [the government's] possession," and under Rule 16 "the government is required to disclose, upon a

defendant's request, certain categories of materials that are within the government's 'possession, custody, or control.'. Palma sought materials in the possession of EPA's civil—rather than criminal—division, other federal agencies and CARB.

The District Court rejected DOJ's argument that under *United States v. Graham*, 484 F.3d 413 (6th Cir. 2007), it was only required to disclose "materials in the possession of members of the prosecution team," as the materials at issue in *Graham* were in the possession of a cooperating witness, not a federal agency.

Palma relied on *United States v. Mills*, ___F. Supp.3d___, Case No. 16-cr-20460 (E.D. Mich. July 30, 2019), for the rule that:

> . . .when the Government knows that some other agency had some involvement in the investigation of a defendant, including state and local investigative agencies, 'the Government must determine if those other agencies have information embraced within Rule 16(a)(1)(E).

Palma also cited to *United States v. Skaggs*, 327 F.R.D. 165, 174 (S.D. Ohio 2018), which held that:

> [t]he prosecution is deemed to have knowledge of and access to material that is in the possession of any federal agency that participated in the investigation that led to defendant's indictment, or that has otherwise cooperated with the prosecution.

The District Court found this persuasive, finding "that the government's discovery obligation extends to civil agencies that were involved in the investigation of [Palma].

Conclusion and Implications

Despite the federal government having produced to this defendant "542,583 documents comprising 4,559,155 pages," the close cooperation of EPA's civil enforcement division and CARB with DOJ provides diesel emissions defendants with a good-faith basis to seek more wide-ranging discovery. It remains to be seen whether additional discovery will provide defendants with additional leverage, or whether DOJ has fought expanded discovery obligations on a policy basis not necessarily rooted in a prosecution strategy specific to this class of cases.
(Deborah Quick)

RECENT STATE DECISIONS

CALIFORNIA COURT OF APPEAL FINDS PROVISIONS IN THE CALIFORNIA PUBLIC RESOURCES CODE RELATED TO THE ENERGY COMMISSION UNCONSTITUTIONAL

Communities for a Better Environment et al. v. Energy Resources Conservation and Development Commission, 57 Cal.App.5th 786 (1st Dist. 2020).

In *Communities for a Better Environment et al. v. Energy Resources Conservation and Development Commission*, California's First District Court of Appeal found that two provisions of the California Public Resources Code, which govern the California Energy Resources Conservation and Development Commission—or Energy Commission—are unconstitutional. First, the court ruled that Public Resources Code § 25531(a), granting judicial review of Energy Commission power plant certifications exclusively to the California Supreme Court, violates Article IV, § 10 of the California Constitution because it unconstitutionally abridges the courts' original jurisdiction. Second, the court concluded that a portion of Public Resources Code § 25531(b) violates the judicial powers clause of Article VI.

Background

Under the Warren-Alquist State Energy Resources Conservation and Development Act (the Warren-Alquist Act), the Energy Commission has exclusive jurisdiction over the siting and permitting of any thermal power plant in California with a generating capacity of 50 megawatts or more. In presiding over an application for certification of a proposed power plant project, if the Energy Commission approves the project, it issues the power plant a "license" or "certification."

When Public Resources Code § 25531 was first adopted as part of the Warren-Alquist Act in 1974, any thermal power plant proposed by a public utility was required to obtain both a Certificate of Public Convenience and Necessity (CPCN) from the California Public Utilities Commission (PUC), as well as a site certificate from the Energy Commission. At that time, the Public Utilities Act provided for exclusive California Supreme Court review of decisions and orders of the PUC. This grant of Supreme Court jurisdiction was expressly contemplated in the California Constitution and thus did not face constitutional scrutiny. As first enacted, § 25531 provided that an Energy Commission decision on an application of a public utility:

> . . .for certification of a site and related [power plant] facility shall be subject to judicial review in the same manner as the decision of the [PUC] on the application for a [CPCN] for the same site and related facility.

Thus, any challenge to the CPCN and related Energy Commission certification would be heard together by the California Supreme Court. Notably, as § 25531 was originally drafted, the Superior Courts retained jurisdiction over Energy Commission certifications of non-utility power plants.

In 1996, the Public Utilities Code was amended to provide for judicial review of PUC decisions by either the California Supreme Court *or* the Courts of Appeal. Subsequently, in 2001, the California Legislature amended Public Resources Code § 25531(a) to provide for California Supreme Court jurisdiction over all Energy Commission power plant certifications not just those for public utility facilities, reading:

> The decisions of the commission on any application for certification of a site and related facility are subject to judicial review by the Supreme Court of California.

Relatedly, § 25531(c) provides that this review is exclusive and that "no court in this state has jurisdiction" otherwise to entertain challenges to Energy Commission certifications.

Related to the scope of judicial review, under

Public Resources Code § 25531(b), the California Supreme Court's review of an Energy Commission certification can extend no "further than to determine whether the commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner" under the U.S. or California Constitutions. Further, under § 25331(b), the findings and conclusions of the Energy Commission are final and not subject to review, and "[t]hese questions of fact shall include ultimate facts and findings and conclusions of the commission."

The Present Action

Environmental groups Communities for a Better Environment and Center for Biological Diversity first filed suit in 2013 challenging the constitutionality of Public Resources Code § 25531. While their claims were first dismissed by the Superior Court as unripe, the Court of Appeal reversed that decision and remanded the case to the Superior Court for further proceedings. On remand, in 2018 the trial court held that: 1) § 25531(a) is an unconstitutional legislative abridgment of the jurisdiction of the courts, and 2) § 25531(b) unconstitutionally curtails the courts' essential power to review agency findings. On November 20, 2020, the Court of Appeal affirmed the trial court's decision.

The Court of Appeal's Decision

Section 25531(a) Unconstitutionally Abridges the Courts' Original Jurisdiction

Under Article VI, § 10 of the California Constitution, the Supreme Court, the Courts of Appeal, and the Superior Courts have original jurisdiction in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition. The Superior Courts have original jurisdiction in "all other causes" except those laid out in § 10. This grant of jurisdiction to the courts may not be diminished by statute, except that the Legislature may limit judicial review of administrative decisions where authorized, either expressly or impliedly, by some other provision of the Constitution. Here, the Court of Appeal determined that § 25531(a) divested the Superior Courts and Courts of Appeal of the original jurisdiction conferred on them in Article IV, § 10. Further, this statutory limitation was not authorized by any other provision of the California Constitution.

The Court of Appeal rejected the argument that the language of Article VI, § 10 empowers the Legislature to decide which of the three courts has original jurisdiction over extraordinary writ proceedings. On its face, § 10 states that the Supreme Court, Courts of Appeal and Superior Courts all have original jurisdiction over extraordinary writ proceedings and that the Superior Courts have original jurisdiction in all other causes. Yet, the Court of Appeal pointed out, nothing in the language allows for the Legislature to determine which among the courts has jurisdiction to hear extraordinary writ proceedings in any given situation. In fact, where the Constitution intends to create an exception, or leeway for the Legislature to define a court's jurisdiction, it does so explicitly, such as in § 11 of Article VI. While § 10 fails to specify a single court of first resort for extraordinary writ proceedings, the courts have discretion in exercising their shared original jurisdiction—not the Legislature. Section 25531(a), read in conjunction with § 25531(c), bars Superior Courts and Courts of Appeal from ever reviewing Energy Commission decisions. Details of the legislative history of § 10 presented by the Energy Commission did not persuade the Court otherwise. The case law relied upon by the Energy Commission also failed to establish that the California Supreme Court has construed § 10 to empower the Legislature to assign administrative mandate cases to specific courts.

Finally, the Court noted that Article XII, § 5 of the California Constitution no longer provides constitutional authority for § 25531(a). Article XII, § 5 provides the Legislature with authority over PUC matters, including the power to restrict judicial review of PUC decisions. But this legislative authority does not implicitly extend to Energy Commission siting decisions, since § 25531 is no longer tied to PUC decisions on CPCNs. The Court of Appeal was unpersuaded by the Energy Commission arguments that the PUC's and the Energy Commission's "regulatory functions" are linked, such that the authority given to the Legislature by Article XII, § 5 extends to Energy Commission decisions.

Section 25531(b) Violates the Judicial Powers Clause

Article VI, § 1 vests the judicial power of the

State in the California Supreme Court, the Courts of Appeal, and the Superior Courts. The California Constitution also empowers certain administrative agencies to exercise judicial authority. The Court of Appeal upheld the lower court's finding that Public Resources Code § 25531(b) is unconstitutional because the statute purports to confers judicial power on the Energy Commission, where the Constitution has not vested the Energy Commission with such power. Where agencies have not been vested by the Constitution with judicial power, they may not exercise such powers.

The California Supreme Court has established that an agency may constitutionally hold hearings, determine facts, apply the law to those facts, and order relief, but only if the essential judicial power, *i.e.* to make enforceable binding judgments, remains ultimately in the courts, though review of agency determinations. Section 25531(b) impermissibly limits the judiciary's power to review Energy Commission fact-finding because it provides that the findings and conclusions of the Energy Commission on questions of fact are final and not subject to review.

Conclusion and Implications

With § 25531(a) and (b) deemed unconstitutional, Energy Commission decisions on proposed power plants will no longer be insulated from judicial review. To date, when Energy Commission decisions have been challenged, they have rarely been granted *certiorari* by the California Supreme Court, with the result that Energy Commission decisions are typically shielded from any lawsuit. There are now fewer natural gas-fired power plant applications brought to the Energy Commission, given the state's ambitious renewable energy and carbon reduction targets. But with the decision in *Communities for a Better Environment v. Energy Resources Conservation and Development Commission*, if a natural gas-fired power plant is certified by the Energy Commission in the future, it could be the first to face judicial review in Superior Court. The court's decision and modified decision are available online at: https://www.courts.ca.gov/opinions/documents/A157299M.PDF and https://www.courts.ca.gov/opinions/documents/A157299N.PDF (Allison Smith)

CALIFORNIA COURT OF APPEAL ADDRESSES AN EIR WHICH DID NOT RELY ON CALIFORNIA'S CAP-AND-TRADE PROGRAM FOR ITS GREENHOUSE GAS IMPACTS ANALYSIS

Paulek v. City of Moreno Valley (*HF Properties*),
___Cal.App.5th___, Case No. E071194 (4th Dist. Nov. 24, 2020).

California's Fourth District Court of Appeal in *Albert Paulek v. City of Moreno Valley* (*HF Properties*) held that a revised Environmental Impact Report (EIR) which did not rely on the California Air Resources Board (CARB) Cap-and-Trade Program (C&T Program) for its analysis and mitigation of Greenhouse Gas (GHG) impacts of a major logistics warehouse center (Project) mooted an appeal challenging the Environmental Impact Report's (EIR) initial reliance on the C&T Program for analysis and mitigation of Project GHG emissions.

Factual and Procedural Background

The Project is the World Logistics Center to be built by 2031 on over 40 million square feet of undeveloped land in the City of Moreno Valley (City). The Project applicants (Highland Fairview) submitted their application for the Project in 2012. The city council certified a final EIR for the Project and approved its construction in 2015.

Various individuals and environmental organizations filed petitions for writ of mandate under the California Environmental Quality Act (CEQA) challenging the EIR in numerous respects. The trial court found the EIR faulty for five reasons: 1) lack of good faith analysis of potential sources of Project renewable energy; 2) improper description of an area near the Project as a "buffer zone;" 3) improper analysis of Project noise impacts; 4) lack of analysis and mitigation of Project impacts on farmland; and 5) lack of sufficient information and analysis of Project cumulative impacts.

The trial court thus granted the petition in part but rejected petitioners' remaining arguments, including that the EIR's analysis and mitigation of GHG impacts was improper. The trial court ordered the City to vacate its approval of the parcel map associated with the Project and to proceed consistent with the trial court orders in any subsequent CEQA review of the Project.

Petitioners appealed the trial court's upholding of the EIR's analysis and mitigation of GHG impacts, and the City cross-appealed the trial court's finding that the EIR violated CEQA in five respects.

In May 2020, the Court of Appeal issued a tentative opinion in which it held that the EIR's reliance on the C&T Program for its analysis and mitigation of GHG impacts violated CEQA but affirmed the judgment in all other respects except for the trial court's analysis of one other issue (not specified in the opinion).

In June 2020, the City adopted a resolution vacating the EIR and certifying a Revised EIR for the Project curing the five CEQA violations found by the trial court. In response to the Court of Appeal tentative opinion, the Revised EIR did not include the C&T Program in its analysis of GHG emission impacts and included a new mitigation measure which requires all of the Project's GHG emissions to be mitigated to "net zero." Thus, the developer will need to purchase "carbon offset credits" equal to the amount of the Project's entire GHG emissions, instead of relying on the C&T Program as mitigation to mitigate most of the emissions.

CARB thereafter submitted a letter stating that the Revised EIR nonetheless still relied on the C&T Program for its analysis and mitigation of GHG impacts, but not explaining in what manner the EIR does so.

In late July 2020, about two weeks before oral argument, the City moved to dismiss the appeal and cross-appeal as moot because: 1) the City vacated the EIR and adopted the Revised EIR which does not rely on the C&T Program for its GHG impacts analysis and mitigation, and 2) the City complied with the trial court's orders granting petitioners' writ petitions with respect to the five CEQA violations found by the trial court.

The Court of Appeal's Decision

The Court of Appeal dismissed petitioners' appeal as moot, holding that the only issue upon appeal was whether the trial court erroneously found that the EIR's reliance on the C&T Program for its analysis and mitigation of GHG impacts violates CEQA, and that the Revised EIR analysis no longer relies on the C&T Program to analyze and mitigate GHG emissions. The Court of Appeal also used its discretion to dismiss the City's cross-appeal pursuant to California Rule of Court 8.244(c)(2) based on the City's evidence that it was filed as a protective appeal to preserve the City's rights in light of petitioners' appeal.

CARB'S C&T Program

The C&T Program was one of the strategies adopted by CARB as part of California's Global Warming Solutions Act of 2006 (AB 32). The C&T Program was promulgated by CARB regulations in 2011. The C&T Program is a market-based approach where the Cap is the limit on total amount of assigned or auctioned Allowances (allowed emissions) from a regulated source. Trade of Credits (for reduced emissions below Allowances) creates incentives among source emitters to reduce emissions.

California Code of Regulations § 95811 lists the source emitting "covered entities" which receive Allowances and are subject to the C&T Program, including various production facilities, suppliers of natural gas, fuel importers, and electricity generating facilities. Those industrial facilities and suppliers can spread the costs of compliance broadly among large numbers of consumers.

The EIR GHG Analysis

For GHG analysis, the South Coast Air Quality Management District (SCAQMD) uses a project "significance threshold" of 10,000 metric tons for GHGs. The EIR found that the Project's expected annual GHG emissions would exceed 127,000 metric tons in 2014 and by 2022 would reach about 665,000 metric tons of carbon dioxide equivalent, levelling off to approximately 416,000 metric tons at buildout in 2031. The EIR found that about 40 percent of the Project's GHGs would be emitted by trucks coming to and from the Project site in 2014, increasing to 55 percent in 2022.

The EIR found that use of the C&T Program to reduce Project GHG emissions was not likely for individual logistics warehousing such as the Project,

given that the Project was not a covered entity under AB 32. Regardless, the EIR categorized the Project's GHG emissions as 95 percent "Capped" emissions (mostly from fossil fuels by miles traveled from off-site mobile sources such as trucks and autos; but also, from on-site electricity, construction fuel, yard trucks, natural gas, generators, forklifts) and 5 percent as "Uncapped" emissions (waste, land use, construction, refrigerants).

The EIR reasoned that because covered entities under AB 32 for C&T Programs include natural gas suppliers, transportation fuel importers and electricity generators, the EIR did not need to consider Capped emissions from covered entity types of energy sources in determining whether the Project would have a significant impact under CEQA and in mitigating Project GHG impacts. The EIR thus only analyzed and provided for mitigation of the Project's Uncapped Emissions, finding that the "mitigated uncapped emissions" would not exceed the SCAQMD significance threshold.

Mootness under the Revised EIR GHG Analysis

An appeal is moot if events while the appeal is pending render it impossible for the appellate court to grant the appellant effective relief. (*La Mirada Avenue Neighborhood Assn. of Hollywood v. City of Los Angeles*, 2 Cal.App.5th 586, 590 (2016).) The Court of Appeal held that because the Revised EIR no longer relies on the C&T Program, which is not a program applicable to Project emissions, the Revised EIR now addresses and mitigates all Project GHG emissions through a Project-specific mitigation measure, which is precisely the result sought by petitioners on appeal. The Court of Appeal rejected the letter submitted by CARB as evidence in opposition to mootness, because it fails to explain how the Revised EIR still relies upon the C&T Program.

Petitioners nonetheless argued that the issue of whether an EIR can rely on the C&T Program to dismiss the significance of GHG emissions for projects not subject to the C&T Program is an issue that fits within one of three recognized discretionary exceptions to mootness. Those exceptions are: 1) an issue of broad public interest that is likely to recur; 2) a recurrence of the controversy between parties; or 3) a material question remains for court determination. (*Cucamongans United for Reasonable Expansion v. City of Rancho Cucamonga*, 82 Cal.App.4th 473, 479 (2000).)

With respect to the first exception, while the Court of Appeal agreed that the issue is one of broad public interest, it concluded that the issue was not likely to recur because no entity currently relies or intends to rely on C&T Program analysis for projects not subject to the Program.

The Court of Appeal also concluded that there is no evidence in the record to suggest likely recurrence of the controversy because discussion in the EIR regarding the South Coast Air Quality Management District and San Joaquin Valley Air Pollution Control District not counting the C&P Program against the SCAQMD significance threshold concerned GHG emissions that *are* subject to the Program.

Conclusion and Implications

This opinion by the Fourth District Court of Appeal adheres firmly to the mootness doctrine to avoid deciding the issue of whether an EIR can rely on the C&T Program to dismiss the significance of GHG emissions for projects not subject to the C&T Program. While there is a colorable argument that additional project-specific mitigation should not be required for GHG impacts that have been programmatically addressed through the C&T Program, with the City's withdrawal of the argument, there is no pending attempt or intent to raise the issue in a well-developed context that would allow the Court of Appeal to thoroughly consider the merits of the argument. The Court of Appeal wisely decided to forbear from adjudicating the issue until such a time and occasion as the argument might gain further traction. https://www.courts.ca.gov/opinions/nonpub/E071184.PDF

(Boyd Hill)

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